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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. 258

In the Matter of the Estates of Jack P. Kalpakoff and Mary Kalpakoff.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
Attorney for Petitioner.

WALTER C. DURST,
639 South Spring Street,
Los Angeles 14, California,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

A.

Opinions below 2

B.

Grounds on which jurisdiction is invoked 2

C.

Questions presented 2

D.

The statutes which the case involves 3

E.

Statement 4

F.

Reason for granting the writ 8

This case presents important questions of bankruptcy law which have not, but should be, determined by this honorable court. The fair construction and application of state law is involved 8

(1) Petitioner is entitled under state law applicable to bankruptcy under 28 U. S. C., Section 1652, to supersedeas without bond under Rule 62(f), Federal Rules of Civil Procedure 8

(2) Irreparable damage to creditors since 1952 9

(3) Bankruptcy Act, Section 2(a)(21) 10

G.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision 11

PAGE

Reversal 14

Conclusion 15

Appendices:

Appendix "A." Order denying motions pending appeal and order extending time to file petition for writ of certiorari ..... App. p. 1

Appendix B. Opinion of the Referee in Bankruptcy.. App. p. 3

Appendix C. Opinion of the District Court..... App. p. 9

Appendix D. Jurisdiction ..... App. p. 10

TABLE OF AUTHORITIES CITED

CASES	PAGE
Albin v. Cowing Joint Co., 317 U. S. 211, 87 L. Ed. 212	14
Anderson-Cottonwood Irr. Dist. v. Mason, 135 F. 2d 112	9
Archer v. Miller, 192 Cal. 67	9
Arizona Edison Co. v. Southern Sierra Power Co., 17 F. 2d 739	14
Brainard v. Fitzgerald, 3 Cal. 2d 157	10, 12
Brown v. Detroit Trust Co., 193 Fed. 622	8
Callaway v. Benton, 336 U. S. 132, 93 L. Ed. 553	11, 13
Carroll, Re Matter of, 274 N. Y. 288, 8 N. E. 2d 864	11
Chittenden v. Brewster, 69 U. S. 191, 17 L. Ed. 839	10, 12
Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97	11, 13
Deneale v. Young, Case No. 3785, 2 Cranch. C. C. 200, 7 Fed. Cas. 460	9
De Tamble, In re, 88 F. 2d 893	13
Emil v. Hanley, 130 F. 2d 369	13
Emil v. Hanley, 318 U. S. 515, 87 L. Ed. 954	10, 13
Erie R. Co. v. Tompkins, 304 U. S. 64, 87 L. Ed. 954	10, 12
Forbes v. Scannell, 13 Cal. 242	10, 12
Galbraith v. Kline, 7 F. 2d 682	10, 11
Galbraith v. Vallely, 256 U. S. 46, 65 L. Ed. 823	11, 13
Greyling Realty Corp., Matter of, 74 F. 2d 734	13
Harrison v. Chamberlain, 271 U. S. 191, 70 L. Ed. 897	13
Horne v. Title Ins. & Trust Co., 79 Fed. Supp. 91	10, 11
Kohn v. Ryan, 31 Fed. 636	10, 11
Lake v. Dowd, 207 Cal. 290	12, 13
Louisville Trust Co. v. Commingor, 184 U. S. 18, 46 L. Ed. 413	11, 13
Louisville Trust Co. v. Knott, 130 Fed. 820	10
McPherson v. Parker, 30 Cal. 455	10, 12
Mitaw v. Rodden, 149 Cal. 1	12, 13

PAGE

Neel v. Barnard, 24 Cal. 2d 406 ..... 10, 11
North Carolina R. v. Story, 268 U. S. 288, 69 L. Ed 959 14
Ponzi v. Fessenden, 258 U. S. 254, 66 L. Ed. 607 ..... 10, 12
Ripka v. Philco Corporation, 65 Fed. Supp. 21 9
Sharp v. Bonham, 213 Fed. 660 ..... 10, 12
United States Oil & Land Co. v. Bell, 219 Fed. 785 9

RULES

Federal Rules of Civil Procedure, Rule 62(f) 2, 4, 8

STATUTES

Bankruptcy Act, Sec. 2(a)(21) 2, 4, 10, 13
Bankruptcy Act, Sec. 24 2
Bankruptcy Act, Sec. 25(b) 3
Bankruptcy Act, Sec. 401 3
Bankruptcy Act, Sec. 402 3
Bankruptcy Act, Sec. 416 2
Bankruptcy Act, Sec. 475 ..... 2, 4
Bankruptcy Act, Sec. 506 4
Bankruptcy Act, Sec. 507 4
Bankruptcy Act, Sec. 508 4
Bankruptcy Act, Sec. 509 ..... 2, 4, 12
California Civil Code, Sec. 870 ..... 4, 10, 11
California Civil Code, Sec. 1060 ..... 4, 10, 11
California Civil Code, Sec. 2279 ..... 4, 10, 11
California Code of Civil Procedure, Sec. 389 ..... 4, 10, 13
California Code of Civil Procedure, Sec. 944 ..... 4, 8
California Code of Civil Procedure, Sec. 946 ..... 4, 8
United States Code, Title 11, Sec. 11(a)(21) 2, 3
United States Code, Title 11, Sec. 47 2
United States Code, Title 11, Sec. 48(b) 3

PAGE

United States Code, Title 11, Sec. 801 3
United States Code, Title 11, Sec. 802 3
United States Code, Title 11, Sec. 816 2
United States Code, Title 11, Sec. 875 ..... 2, 4
United States Code, Title 11, Sec. 906 4
United States Code, Title 11, Sec. 909 ..... 2, 4, 12
United States Code, Title 28, Sec. 1254 2
United States Code, Title 28, Sec. 1651 4
United States Code, Title 28, Sec. 1652 ..... 3, 4, 8, 10, 12
United States Code, Title 28, Sec. 2101 2
United States Constitution, Fifth Amendment 2, 3

TEXTBOOK

Bouvier's Law Dictionary (1934), p. 159 11

IN THE

Supreme Court of the United States

October Term, 1954

No. .....

In the Matter of the Estates of Jack P. Kalpakoff and Mary Kalpakoff.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner the respondent-appellant, Walter C. Durst, a private trustee for creditors the real parties in interest, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, petitions for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to hear and review the order made February 23, 1955, denying permanent stay, injunction and restraining order on appellant's applications therefor. (Appx. "A".) By order of this Court dated May 20, 1955, the time for filing a petition for certiorari was extended to July 23, 1955. (Appx. "A".)

A.
Opinions Below.

The opinions of the Referee in Bankruptcy are found in Appendix B and in the record as set forth. The opinions of the District Court in Bankruptcy are found in Appendix C and in the record as set forth.

B.
Grounds on Which Jurisdiction Is Invoked.

(Text appears in Appendix D.)

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of:

28 U. S. C., Sec. 1254, in part;

28 U. S. C., Sec. 2101, in part;

Bankruptcy Act, Sec. 24 (11 U. S. C. Sec. 47);

Bankruptcy Act, Sec. 416 (11 U. S. C., Sec. 816);

Fifth Amendment to the United States Constitution.

Bankruptcy Act, Sec. 2(a)(21) (11 U. S. C., Sec. 11(a)(21));

Bankruptcy Act, Sec. 475 (11 U. S. C. Sec. 875);

Bankruptcy Act, Sec. 509 (11 U. S. C., Sec. 509);

C.
Questions Presented.

1. Is the appellant entitled to supersedeas without bond under Rule 62(f) of the Rules of Civil Procedure where he has complied with all State Law and statutory requirements, as against a trustee in bankruptcy a successor resulting *cestui que trust* whose petitioner asserts has no right of possession of the assets of the general assignment and whose claims petitioner assets are in con-

travention of state law of trusts and in violation of title 28 U. S. C., Sec. 1652?

2. Does the appellee, a resulting *cestui que trust* of the general assignment, have possessory rights in and of assets of the trust?

3. Does the Bankruptcy Court have jurisdiction over the general assignment prior to confirmation of plan or arrangement in Chapter XII?

4. Is the execution of a non object of the trust a fraud on the object of the trust?

5. Is it true or false that the order of the Bankruptcy Court supersedes and nullifies all the provisions of the general assignment for the benefit of creditors made four years and five months prior to the petition in bankruptcy with reference to what the assignee should do with the property?

6. Does Title 28, Section 1652 apply to Bankruptcy Courts?

D.

The Statutes Which the Case Involves.

(Pertinent text appears in Appendix D.)

Fifth Amendment to the Constitution of the United States;

Bankruptcy Act, Sec. 2(a)(21)(11 U. S. C., Sec. 11(a)(21));

Bankruptcy Act, Sec. 25(b) (11 U. S. C., Sec. 48(b);

Bankruptcy Act, Sec. 401 (11 U. S. C., Sec. 801);

Bankruptcy Act, Sec. 402 (in part) (11 U. S. C., Sec. 802);

Bankruptcy Act, Sec. 475 (11 U. S. C., Sec. 875);

Bankruptcy Act, Secs. 506, 507, 508, and 509 (11 U. S. C., Secs. 906 and 909;

28 U. S. C., Secs. 1651 and 1652;

Federal Rules of Civil Procedure, Rule 62(f);

Cal. Civ. Code, Secs. 870, 1060 in part, 2279;

Cal. Code Civ. Proc., Secs. 389, 944, and 946 in part.

E.
Statement.

The main case involves the construction of Bankruptcy Act, Section 2(a)(21), as to an "assignee for the benefit of creditors" and "assignments" under Chapter XII, for the first time since it has been amended by the Chandler Act of 1938, and interpreted by the Referee in bankruptcy as deleting the provisions of the four month limitation. The common law general assignment [R. 14-17] here involved was created November 25, 1949, by recordation thereof and of deeds, bill of sale, and crop mortgages. [Ex. "E," pp. 11-24.] No common law general assignment case appears in the reports since the 1934 amendments of the Bankruptcy Act, which apparently dealt with some of the aspects of the four month period of limitation.

The debtors in 1949 owned two ranches and other property. They were heavily pressed by indebtedness, and both ranches were under default and in danger of foreclosure. The creditors were pressing heavily. The Franzier-Lempke Act had expired. Petitioner commencing in 1922 has served as receiver and trustee in Los Angeles during which year he was secretary to the then District Judge Oscar A. Trippet, now deceased. Petitioner was called into the case by P. M. Schwabacher the

attorney for the Kalpakoffs [Ex. "F" pp. 1-4, line 18 thereof]. Documents signed by the Kalpakoffs were approved by P. M. Schwabacher their attorney [Ex. "E" pp. 8, 9, 10]. On November 25, 1949, the owners of the ranches made a common law general assignment for the benefit of their creditors under State law and State practice in California [R. 14-17]. Their only interest in the two ranches after the expiration of the four month period was, and is, as resulting *cestui que trust*, entitled to the surplus, if any, after creditors the real parties in interest, were paid 100 cents on the dollar, if possible. The assignee in three year's time by operation of the Los Angeles County ranch, lease of the Kern County ranch, sale of city property, and sale of personal property was able to secure ranch lienholder defaults by December 1, 1952 [R. 51, 52]. Also in 1952 the debtors prevented a $75,000, cash sale of the Kern County ranch and said sale was lost [Ex. "E" pp. 204-205]. The operating alfalfa beds on the Los Angeles County ranch were so depleted that the assignee ceased to "deem it proper" to continue operations. In 1953 creditors, the real parties in interest, demanded payment and the assignee sought to sell a ranch or ranches for payment to the creditors of 100 cents on the dollar, if possible the surplus, if any, to the assignor as resulting *cestui que trust* of the general assignment. On April 23, 1953, the assignor brought suit in the State Court to vacate transfers, for appointment of Receiver and for general equitable relief in which suit all creditors were ordered made indispensable party defendants. A sale of the Kern County ranch for $70,000 Ex. "E" pp. 242-245] was interfered with by *lis pendens* filed [Ex. "E", p. 222]. The lienholder creditors on both ranches came into default and foreclosures were started.

The debtors to avoid foreclosures, on April 1954 filed their original Chapter XII Proceedings under the Federal Bankruptcy Act, wherein they agreed to pay creditors 100 cents on the dollar, from the operation or sale of a ranch or ranches [R. 6] and scheduled their only interest in the general assignment as resulting *cestui que trust* thereof [R. 8]. The foreclosures were restrained [Ex. "H"]. The debtors signed their names to documents to carry out the $70,000 sale aforesaid [Ex. "E" pp. 242-245].

On May 26, 1954, the debtors amended their petition, and schedules [R. 9] wherein they also set forth their only interest as resulting *cestui que trust* of the general assignment [R. 9, 10] and elected the primary jurisdiction of the aforesaid State Court [Ex. "I", Sheet 3, proposed Real property arrangement]. No plan or arrangement has been confirmed herein.

On June 2, 1954 inconsistently with such election of the primary jurisdiction under State law and of the State Court, the debtors brought summary proceedings [R. 11-20] in which indispensable creditors were not named respondents in the Bankruptcy Court against the assignee for turnover of the assets of the general assignment.

The assignee appeared specially [R. 92] challenged jurisdiction [R. 20, 21, 22] asserted adverse claim, prior pending plenary state Court equity suit, omissions of indispensable party creditors of the general assignment as respondents [R. 92-107].

Turnover and accounting were ordered June 15, 1954 [R. 22-26]. Stay was denied [R. 26-30]. Petition for review [R. 30-35] was filed, thereafter the trustee in bankruptcy brought proceedings to enforce turnover [R.

112-125], at which the assignee, appeared specially [Ex. "K"], challenged the jurisdiction alleged want of equity [R. 166-167; see R. 131, 132] respecting offer of proof filed accounting [Exs. "A", "B", "C", "D", and "E"] and was certified to the District Court [R. 35-38], appeared specially [R. 44-67], objected to jurisdiction [R. 71-73; Ex. "F"] moved to dismiss citation for contempt [R. 133-134] the District Court affirmed the referee in all particulars [R. 186], objected to certificates [R. 184, 186-188, 190; Ex. "L" and "M"; R. 196-199] denied injunction, and restraining order, and affirmed denial of stay [R. 134-138, 186]. The assignee under threat of punishment for contempt deposited the conveyances with the Clerk of the District Court to abide judgment of the appellate courts [R. 200; Ex. "O"]. The aforesaid accounting and conveyances deposited constitute full compliance with the aforesaid turnover order of June 15, 1954. No attack has ever been made on either the accounting or the conveyance, or that petitioner has not administered his trust impartially, fairly and accurately. All the orders of the District Court were appealed [R. 140-141].

The trustee in Bankruptcy proceeded with the notice of sale of assets included in the aforesaid conveyance, resulting in a second petition for review, a second appeal and a pending petition for review. Also pending is a fourth petition for review of order confirming sale, now under submission by the District Court which may ripen into a third appeal.[1] A petition by the trustee in Bankruptcy to dismiss the prior pending plenary State Court equity suit is now under submission by the referee in bankruptcy

[1]Each of these petitions for review become necessary to preserve the *status quo* of the litigation and to avoid waiver.

which may ripen into a petition for review and appeal. A petition by the lienholder of the Kern County ranch to lift the order restraining foreclosure sale is pending before the Referee, petitioner in his response made a suggestion of either increase the bond of the Trustee in Bankruptcy to $132,150, or granting supersedeas without bond for the protection of creditors the real parties in interest and may ripen into a petition for review and appeal. In the Court of Appeals the appellee's petition to dismiss is under submission, and appellant's petition for stay of mandate without bond is pending.

F.

Reason for Granting the Writ.

This Case Presents Important Questions of Bankruptcy Law Which Have Not, but Should Be, Determined by This Honorable Court. The Fair Construction and Application of State Law Is Involved.

(1) Petitioner Is Entitled Under State Law Applicable to Bankruptcy Under 28 U. S. C., Section 1652 to Supersedeas Without Bond Under Rule 62F Federal Rules of Civil Procedure.

The refusal of the courts below to grant stay, injunction and restraining order, appears to be a departure from the following rule, statute and cases:

28 U. S. C., Sec. 1652;

Federal Rules of Civil Procedure, Rule 62(f);

Cal. Code Civ. Proc., Sec. 944, and second sentence of 946;

Brown v. Detroit Trust Co. (6th Cir.), 193 Fed. 622, 627,

". . . Proceedings to review . . . suspended the operation of the referee's order. . . ."

United States Oil & Land Co. v. Bell (9th Cir.), 219 Fed. 785, 790, 791;

Anderson-Cottonwood Irr. Dist. v. Mason (9th Cir.), 135 F. 2d 112, 114;

Ripka v. Philco Corporation, 65 Fed. Supp. 21, 39;

In re Deneale v. Young, Case No. 3785, 2 Cranch C. C. 200, 7 Fed. Cas. p. 460;

Archer v. Miller, 192 Cal. 67.

(2) Irreparable Damage to Creditors Since 1952.

The creditors, the real parties in interest, relying on state law procedure under the assignment have suffered irreparable loss since 1952 when the debtors began interfering with sales, in that they have been kept out of their money, and by reason of the litigation have lost the rental value of both ranches of about $5,000.00 to $10,000.00 per year for the year 1953, 1954, and to date in 1955. The creditors total upwards of $110,000.00, of which upwards of $30,000.00 have had no payment on account for over five years, seven months and 20 days, all of whose claims are fixed as to liability and liquidated as to amount in the general assignment and they have vested rights therein under applicable State law and in the prior pending State Court equity suit [Ex. "E" pp. 223-235]. The creditors have no adequate remedy at law in that the bond of the trustee in bankruptcy is fixed at $5,000.00 [R. 110] and the assets of the general assignment inventory at $132,150.00 [Ex. "D" pp. 10, 11, 12].

(3) BANKRUPTCY ACT, SECTION 2(a)(21).

The interpretation in the main case by the Bankruptcy Court of Bankruptcy Act, Section 2(a)(21) involves judicial legislation in that the Referee in contravention of the trust created by the general assignment ruled:

> ". . . The order of the Bankruptcy Court supersedes and nullifies all the provisions of the assignment with reference to what the Assignee should do with the property." [R. 123.]

Said order and ruling apparently supersedes and nullifies California statutory law and decisions of the California Supreme Court as follows:

Cal. Civ. Code, Sec. 2279;
Cal. Civ. Code, Sec. 870;
Cal. Civ. Code, Sec. 1060;
Cal. Code Civ. Proc., Sec. 389;
Brainard v. Fitzgerald, 3 Cal. 2d 157, 163;
Forbes v. Scannell, 13 Cal. 242;
Neel v. Barnard, 24 Cal. 2d 406, 421;
McPherson v. Parker, 30 Cal. 455;

and the following Federal statute and cases:

28 U. S. C. A., Sec. 1652;
Chittenden v. Brewster, 69 U. S. 191, 17 L. Ed. 839;
Emil v. Hanley, 318 U. S. 515, 87 L. Ed. 954;
Kohn v. Ryan, 31 Fed. 636, 638;
Galbraith v. Kline, 7 F. 2d 682, 684;
Horne v. Title Ins. & Trust Co., 79 Fed. Supp. 91;
Ponzi v. Fessenden, 258 U. S. 254, 66 L. Ed. 607;
Sharp v. Bonham, 213 Fed. 660, 668;
Louisville Trust Co. v. Knott, 130 Fed. 820, 825;
Erie R. Co. v. Tompkins, 304 U. S. 64, 87 L. Ed. 954;

Gallaway v. Benton, 336 U. S. 132, 93 L. Ed. 553;

Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97;

Louisville Trust Co. v. Commingor, 184 U. S. 18, 46 L. Ed. 413;

Galbraith v. Vallely, 256 U. S. 46, 65 L. Ed. 823.

G.

The Court of Appeals Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings, or so Far Sanctioned Such Departure by a Lower Court, as to Call for an Exercise of This Court's Power of Supervision.

The trustee in bankruptcy is a successor resulting *cestui que trust* purportedly in possession alleged to be tortious.

Galbraith v. Kline, 7 F. 2d 682, 684;

Kohn v. Ryan, 31 Fed. 636, 638;

Re Matter of Carroll, 274 N. Y. 288, 298, 8 N. E. 2d 864, 866, 867;

Bouvier, 1934, p. 159, "*Cestui que trust* . . . has no legal title to the estate, as he is merely a tenant at will if he occupies the estate." (Cites cases.)

The petitioner, a private trustee for creditors the real parties in interest, as assignee for the benefit of creditors is entitled to the presumption of good faith.

Neel v. Barnard, 24 Cal. 2d 406, 421.

The turnover order requiring conveyance makes no provision that the trust created by the general assignment follows the land, or that the trustee in bankruptcy shall execute the object of the trust.

Cal. Civ. Code, Secs. 870, 1060, 2279;

Horne v. Title Insurance & Trust Co., 79 Fed. Supp. 91, 95.

The turnover order makes no provision in the event of reversal thereof, or for judgment either way in the prior pending plenary State Court equity suit, or for the rights of interested parties to be reinstated, upon no plan or arrangement being confirmed.

Bankruptcy Act, Sec. 509 (11 U. S. C., Sec. 909).

The turnover order of the bankruptcy court apparently supersedes and nullifies the following leading general assignment cases:

Brainard v. Fitzgerald, 3 Cal. 2d 157, 163;

Forbes v. Scannell, 13 Cal. 242, 278, 285, 287 and 288;

McPherson v. Parker, 30 Cal. 455, 457 (Cited in *Mitaw v. Rodden,* 149 Cal. 1, 7, and *Lake v. Dowd,* 207 Cal. 290, 293.)

The turnover order is without regard to the primary jurisdiction of the prior pending plenary State Court equity suit, as to which the debtors made an election in their amended schedules and their proposed Real Property Arrangement [Ex. "I", Sheet 3]. The turnover order apparently supersedes and nullifies the following cases in this respect:

Chittenden v. Brewster, 69 U. S. 191, 196, 17 L. Ed. 839;

Ponzi v. Fessenden, 258 U. S. 254, 259, 66 L. Ed. 607;

Sharp v. Bonham, 213 Fed. 660, 668.

The turnover order apparently supersedes and nullifies Title 28, Section 1652, and *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, that State Law governs

rights, which are preserved in bankruptcy though remedies may be changed.

In re De Tamble, 88 F. 2d 893, 895.

The bankruptcy court has no power to enlarge the debtors' interest as same existed at the date of bankruptcy.

Callaway v. Benton, 336 U. S. 132, 93 L. Ed. 553.

The turnover order of the bankruptcy court supersedes and nullifies the leading case on the interpretation of Bankruptcy Act, Sec. 2(a)(21), *Emil v. Hanley,* 318 U. S. 515, 87 L. Ed. 954, and *Emil v. Hanley,* 130 F. 2d 369, 373, in the dissent is cited the *Matter of Greyling Realty Corp.,* 74 F. 2d 734, 737, as an example of a state court receivership being superseded because the issue of fraud therein set forth was avoided by the parties and could ". . . not be determined in the court of primary jurisdiction . . ." The issue of fraud is raised and can be determined in the prior pending plenary State Court equity suit. [See answer of defendant Walter C. Durst, Ex. "E", pp. 223-235 thereof.] (See, also, *Harrison v. Chamberlain,* 271 U. S. 191, 70 L. Ed. 897.)

The turnover order apparenty supersedes and nullifies summary jurisdiction cases:

Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97;

Louisville Trust Co. v. Commingor, 184 U. S. 18, 46 L. Ed. 413;

Galbraith v. Vallely, 256 U. S. 46, 49, 65 L. Ed. 823.

The turnover apparently supersedes and nullifies California law that requires creditors indispensable parties to be made respondents.

Cal. Code Civ. Proc., Sec. 389;

Lake v. Dowd, 207 Cal. 290;

Mitau v. Rodden, 149 Cal. 1.

Reversal.

This petition is presented by reason of the far reaching nationwide interest, of all Credit Grantors, in each of the 48 states and the territories of the United States, where either statutory or common law general assignments for the benefit of creditors are used. On behalf of the Real Parties in Interest, and on behalf of all Credit Grantors throughout the United States and the Territories thereof who may be affected by the ruling aforesaid, and by reason of petitioner's status as a trustee, petitioner prays that, if, upon examination of the record in connection with the above mentioned orders denying stay, injunction and restraining order, and omission to rule on supersedeas, it shall appear to the Court that the bankruptcy court lacked jurisdiction to make the turnover order appealed, or abused its discretion in refusing stay, injunction, or restraining order, as supersedeas [R. 226-313], then, and in that event this Court may reverse the bankruptcy court before rendition of judgment by the Court of Appeals.

Albin v. Cowing Joint Co., 317 U. S. 211, 87 L. Ed. 212;

North Carolina R. v. Story, 268 U. S. 288, 292, 69 L. Ed. 959;

Arizona Edison Co. v. Southern Sierra Power Co. (9th Cir.), 17 F. 2d 739, 740.

The applications of appellant in the Court of Appeals for stay, injunction, and restraining order, are referred to at pages of the Record [R. 226 to 300]. The application for supersedeas is referred to at pages of the Record [R. 301 to 308]. The application for supersedeas has apparently not been acted upon by the Court of Appeals as of the date of signing this petition.

Conclusion.

This Court has not heretofore had the questions at bar directly presented and we respectfully pray that the petition for a writ of certiorari be granted.

WALTER C. DURST,
A Private Trustee, for Creditors the Real Parties in Interest as Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Appearing Specially, Petitioner.

MORRIS LAVINE,
Attorney for the Petitioner, a Private Trustee, Appearing Specially.

WALTER C. DURST,
Of Counsel.

APPENDIX "A."

At a Stated Term, to wit: The October Term 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twenty-third day of February in the year of our Lord one thousand nine hundred and fifty-five.

PRESENT:

Honorable Albert Lee Stephens, Circuit Judge, Presiding;

Honorable James Alger Fee, Circuit Judge;

Honorable Jon Wiig, District Judge.

In the Matter of the Estates of Jack P. Kalpakoff, etc. No. 14655.

ORDER DENYING MOTIONS PENDING APPEAL.

ORDERED (1) Motion of appellant to make permanent stay of proceedings in the District Court in Bankruptcy and before the Referee in Bankruptcy pending appeal, (2) Motion of appellant to expunge documents after stay, (3) Motion for order to referee to file supplemental certificate on review to be included in record on appeal, and (4) Motion of appellant for injunction and restraining order, etc., be, and hereby are denied.

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled matter.

Attest my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of March, 1955 [R. 310].

/s/ Paul P. O'Brien
Clerk, U. S. Court of Appeals
for the Ninth Circuit

No. 14655

United States Court of Appeals
for the Ninth Circuit

In the Matter of the Estates of
Jack P. Kalpakoff, etc.

CERTIFIED COPY OF ORDER

Supreme Court of the United States
No. ....., *October Term,* 1954

In the Matter of the Estates of
Jack P. Kalpakoff and Mary Kalpakoff

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for Walter C. Durst, Trustee, it is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 23, 1955.

/s/ Wm. C. Douglas
Associate Justice of the Supreme
Court of the United States.

Dated this 20th day of May, 1955.

APPENDIX B.

Referee's Opinion

Referee in Bankruptcy: On Turnover [R. 106-107]:

"The Referee: There is no trial necessary, You are the assignee for the Benefit of Creditors, and you have property of the debtors, and in your capacity as Assignee the Bankruptcy Act confers jurisdiction on the Court in a proceeding under Chapter twelve to require the Assignee to surrender the property and an accounting, regardless of the time the assignment was made.

Mr. Durst: I want to read the Act, Section II, I believe, 21 of the Act.

The Referee: I have read it in its entirety, and what do you find in there that would justify this court in not requiring the Assignee for the Benefit of Creditors to turn over the assets?

Mr. Durst: I submit, your Honor, that a reading of this section for the delivery of the possession and the accounting, that none of the rights which the assignee has are taken away from him. I believe the Assignee stands in exactly the same position as a mortgagee in possession, and I again cite the Preas case.

The Referee: I will read to you the language:

'Require the assignee for the benefit of creditors to deliver the property in their possession or under their control.'

Mr. Durst: I will state that the property which I have is this:

'The general assignment is supported by deeds to the two ranches; the general assignment is further supported by a promissory note in the amount of $95,000, which

was the total debts of the estate at that time, secured by crop mortgages on both of the ranches.'

The Referee: I am sorry, Mr. Durst I think I understand the situation. The petition is granted."

REFEREE'S OPINION, CONTINUED.

Referee in Bankruptcy: On Attachment to Enforce Turnover [R. 121-123]:

"The Referee: . . . Now, my attention has not been called by anybody to any provision of Chapter XII itself—

Mr. Durst: 475.

The Referee: Which says this Court does not have jurisdiction to require an assignee for the benefit of creditors to turn over, notwithstanding the fact that the assignment was made more than four months before the filing of the petition.

Mr. Durst: I request that you read aloud Section 475.

The Referee: All right; Section 475 (reading):

'The court may direct the debtor, his trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver of to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement.'

The Section I have just read is not applicable to the question at hand.

Mr. Durst: I submit it is a—

The Referee: I am sorry, Mr. Durst. I don't want any argument as to that.

Mr. Durst: I ask for a continuance.

The Referee: Article III of Chapter XII sets up the "Jurisdiction, Powers, and Duties of the Court." Section 411 of that Article provides that:

'Where not consistent with the provisions of this Chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.'

I find nothing in Article III specifically referring to the power of the Court to require assignees to turn over.

Now, Mr. Durst, this Court has been functioning here, This Referee, for 18 years and I do not recall another instance where the Court found it necessary to certify anybody for contempt proceedings, and it is with the deepest regret that this court experiences that situation in this case, because this Court is convinced that you seem to be laboring under a false impression here. You repeat and say over and over again that because of the assignment given you, you have no power to do anything with the property involved in the assignment except that given you in the assignment itself, and you don't seem to realize and understand the provisions of the Bankruptcy Act in a proper case terminate that power given you as Assignee for the Benefit of the Creditors, and requires him to do something else, namely, to deliver up possession to the person designated by the Bankruptcy Court. *The order*

of the Bankruptcy Court supersedes and nullifies all the provisions of the Assignment with Reference to what the assignee should do with the property. It is so simple that it doesn't even permit of argument. The Bankruptcy Act vests the Bankruptcy Court with authority to require an Assignee to do certain things; and after a hearing and an admission on your part that you had the status of Assignee for the Benefit of Creditors under a general assignment, an order was made directing you to turn the property over to a designated trustee, and you have failed to do so, and there is nothing remaining for this court to do except certify you for contempt.

Mr. Durst: In that connection I move for a continuance of two weeks.

The Referee: The motion is denied.

Mr. Durst: Also, in that connection, to be permitted to offer here in this matter the Answer of the Assignee in the State Court action, which suit has been referred to in this proposed real property arrangement, that being Superior Court Action transferred to Los Angeles, entitled:

'In the Superior Court of the State of California, in and for the County of Los Angeles, No, TRANSFERRED TO LOS ANGELES, S.F.C. 914. ANSWER OF WALTER C. DURST.'

The Referee: Your offer is denied, on the ground that it is entirely immaterial." (Emphasis added.)

REFEREE'S OPINION INTERPRETED

Referee in Bankruptcy Indicates Turnover Order Premature: During the pendency of the proceedings in the District Court, the referee wrote the following letter [Ex. "N"]:

"UNITED STATES DISTRICT COURT
Southern District of California Central Division
BENNO M. BRINK, Referee in Bankruptcy
327 Federal Building, Temple & Spring Streets,
Los Angeles 12, California.

August 13, 1954.

Siemon & Siemon
Attorneys at Law
259 Haberfelde Building
Bakersfield, California

Re: Jack P. Kalpakoff, Debtor #60963-T
Mary Kalpakoff, Debtor #60964-T

Dear Sirs:

I am preparing and will shortly file my certificate on the petitions for review in the above-mentioned cases, so that the same may be in the file when the contempt matter again comes on for hearing on September 13, 1954.

As the Referee in the above case, I feel it is my duty to call your attention to the fact that it has occurred to me that the order of June 15, 1954 may have been premature in the light of the following extract from Section 2a(21) of the Bankruptcy Act.:

'Require . . . assignees for the Benefit of Creditors . . . to deliver the property in their possession or

under their control to the receiver or trustee appointed under this Act or, *where an arrangement or a plan under this act has been confirmed and* such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement on plan, and in all such cases to account to the court for the disposition . . . of the property of such bankrupt or debtors. . . .'

Very truly yours,

BENNO M. BRINK

Referee in Bankruptcy

BMB:a"

APPENDIX C.

District Court Opinion.

District Court [R. 200]:

"The Court: Just answer yes or no. Have you complied with Referee Brink's order to turnover? I don't want any argument. I want just an answer.

Have you complied with it or haven't you?

Mr. Durst: I hand to the clerk a letter dated November 29, 1954—

The Court: Please Mr. Durst, will you answer the question? I know you have legal objections, and we are going to protect them for you.

Mr. Durst: Thank you, your Honor, Yes, I have complied with it.

The Court: All right.

Mr. Siemon: May I ask—

Mr. Durst: I ask this document, which I have handed in, be spread upon this record in its entirety, a letter to your Honor delivering a deed, in accordance with the order, and that the contents, that the document itself be marked as an exhibit, Exhibit "O" and that the contents of the letter and of the deed be admitted in support of the objections to evidence warranting the finding of contempt.

District Court Opinion Continued

[R. 209].

The Court: . . . I don't like to sign a judgment binding a faithful officer of the court in contempt."

APPENDIX D.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of Title 28 U. S. C. Section 1254, which reads in part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Title 28 U. S. C., Sec. 2101:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.
>
> (e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

Bankruptcy Act, Sec. 24, 11 U. S. C., Sec. 47:

> "§24. Jurisdiction of Appellate Courts. A. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy

in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, However,* that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only; *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate Court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Bankruptcy Act, Sec. 416, 11 U. S. C., Sec. 416:

"Sec. 416. Where not inconsistent with the provisions of this chapter the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

5TH AMENDMENT TO THE CONSTITUTION.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual serv-

ice in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Bankruptcy Act, Sec. 2(a)(21), 11 U. S. C., Sec. 11 (a)(21):

> "(21) Requires receivers of trustees appointed in proceedings not under this act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided Howevver,* That such delivery and accounting shall not be required except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such Property by such receiver, trustee, assignee or agent,

either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

Bankruptcy Act, Sec. 25(b), 11 U. S. C., Sec. 48(b):

"Receivers and Trustees shall not be required in any case to give bond when they take appeals."

Bankruptcy Act, Secs. 401, 402 (in part), 11 U. S. C., Secs. 801, 802 (in part):

"Section 401. The provisions of this chapter shall apply exclusively to proceedings under this chapter.

"Section 402 (in part). The provisions of Chapter I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter. . . ."

Bankruptcy Act, Sec. 475, 11 U. S. C., Sec. 875:

"Section 475. The court may direct the debtor, his trustee, any mortgagees indenture trustee, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement."

Bankruptcy Act, Sections 506, 507, 508 and 509, 11 U. S. C., §§906-909:

"Section 506. A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States of any State in which a receiver or a trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made."

"Section 507. Such prior proceeding shall be stayed by the filing of a petition under this Chapter. The Trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession, the debtor shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the possession thereof. The Trustee or debtor in posession shall also have the right to immediate possession of all real property and chattels real of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage."

"Section 508. The judge shall make such provisions as may be equitable for the protection of the obligations incurred by a receiver or trustee in such prior proceeding and for the payment of the reasonable compensation for services rendered and of the proper cost and expenses incurred therein as may be allowed by the judge."

"Section 509. Upon dismissal of a proceeding under this Chapter, such prior proceeding shall become reinstated and the judge shall allow the reasonable costs and expenses under this chapter, including the allowances provided for in Article XI of this

chapter, and shall make appropriate provision for the retransfer of such property to the person or persons entitled thereto upon such terms as may be equitable for the protection of the obligations incurred in the proceedings under this chapter by the trustee or debtor in possession, and for the payment of the costs and expenses of the proceedings."

Title 28 U. S. C., Sec. 1651:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

"(b) An alternative writ of rule nisi may be issued by a justice or a judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, §90, 63 Stat. 102."

Title 28 U. S. C., Sec. 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Federal Rules of Civil Procedure, Rule 62. Stay of Proceedings to enforce a Judgment.

"(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein,

to such stay as would be accorded him had the action been maintained in the courts of the state."

California Civil Code, Section 870, which reads:

"Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust is absolutely void."

California Civil Code, Section 1060, which reads in part:

"1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, *other than a power in trust which is imperative,* is releasable, . . ." (Emphasis added.)

California Civil Code, Section 2279, which reads:

"A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

California Code of Civil Procedure, Section 389, which reads:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an Action for the recovery of real or personal property, or to determine conflicting claims

thereto, a person, not a party to the action, but Having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment."

California Code of Civil Procedure, Section 944, which reads:

"If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the Clerk with whom the judgment or order is entered to abide the judgment of the appellate court."

California Code of Civil Procedure, Section 946, which reads in part:

". . . and the court may in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. . . ."